Office Supreme Court U.S.
FEB 17
JAMES H. McKENNEY

No. 358 and 359.

Brief of Humphrey & Davie for Appellee.

Nos. 358 and 359.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

Filed Feb. 17, 1899.

SAMUEL H. STONE, Auditor, et al., - *Appellants,* VERSUS BANK OF LOUISVILLE, - - - - *Appellee.*	No. 358.
CITY OF LOUISVILLE, - - - - *Appellant,* VERSUS BANK OF LOUISVILLE, - - - - *Appellee.*	No. 359.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

BRIEF FOR THE BANK OF LOUISVILLE.

ALEXANDER POPE HUMPHREY,
GEORGE M. DAVIE,
Counsel for Appellee.

JOHN P. MORTON & COMPANY, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

SAMUEL H. STONE, AUDITOR, &c., - - - - - - *Appellants,*

No. 358. } *VERSUS*

BANK OF LOUISVILLE, - - - - - - - - - - *Appellee.*

—AND—

CITY OF LOUISVILLE, - - - - - - - - - - - *Appellant,*

No. 359. } *VERSUS*

BANK OF LOUISVILLE, - - - - - - - - - - *Appellee.*

Brief in behalf of President, Directors, and Company of the Bank of Louisville.

STATEMENT OF CASE.

The president, directors, and company of the Bank of Louisville was incorporated by an act in the General Assembly of Kentucky, approved February 2, 1833. The original charter provided that the bank should continue in existence until January 1, 1853. By an act approved February 16, 1838, it was given power to establish certain branches, and it was provided that if it should establish one branch within three years, its charter should be extended four years, and on the establishment of a second branch, the charter should be extended five additional years. The bank established two branches: one at Paducah and one at Flemingsburg, and in this way its charter life

was extended nine years. By an act of the General Assembly of Kentucky, approved February 15, 1858, the charter was extended for twenty years from January 1, 1863. By an act approved May 1, 1880, it was provided that the charter rights and privileges should continue for twenty years from January 1, 1883.

It thus appears that the charter of the Bank of Louisville will not expire until January 1, 1903.

The sixth section of the original charter of the bank is as follows:

> "The cashier of the bank shall, on the first day of July, 1834, and on the same day annually thereafter, pay into the treasury of the State, twenty-five cents on each share held by the stockholders in said bank, which shall be in full of all tax or bonus on said bank, provided that the legislature may increase or reduce the same, but at no time shall the tax imposed on said stock exceed fifty cents on each share held in said bank."

Taking advantage of this right to increase the rate, the legislature, by an act approved February 12, 1836, imposed a tax of fifty cents on each share of stock in all banks.

Judicial Construction of this Charter.

In our brief on behalf of the Bank of Kentucky, we have given the judicial construction of the Court of Appeals upon the charter of the Northern Bank of Kentucky, the Farmers Bank of Kentucky, and the Bank of Kentucky, each of which was substantially similar to that of the Bank of Louisville, and the history of this construction need not be here repeated.

The Hewitt Act.

In the same brief there has been given an account of the passage of what is called "The Hewitt Act."

The Bank of Louisville accepted this act, and has continued, from the time of its acceptance, to comply in full with its terms.

Board of Valuation and Assessment Law of 1892.

The same brief states the effect of the new Constitution adopted in Kentucky in the year 1891, and the passage of the act of November 11, 1892, providing for the Board of Valuation and Assessment.

The Bank of Louisville, although as heretofore stated it had established in the past certain branches, has in the meantime wound up those branches, so that now its only institution is the principal bank, located at Louisville.

Under the terms of this new system of taxation, the Bank of Louisville would be taxed by the State and also by the City of Louisville, to which latter municipality the Board of Valuation and Assessment would make a return, as above indicated.

In 1893, 1894, and 1895, the Bank of Louisville made its returns to the auditor of public accounts, under this law, but under protest.

In July of 1893, and July of 1894, it offered to pay to the auditor the amount of tax calculated under the Hewitt Law, but the auditor refused to receive any amount greater than that due under the new law.

In June, 1895, the Court of Appeals having decided the bank tax cases, the Bank of Louisville paid to the auditor the amount of tax under the Hewitt Law, and also the amount of the difference between what it had paid in 1893 and 1894 and the amount due under the Hewitt Law.

It has proceeded in the same way since then.

In 1897, the Court of Appeals having delivered the new opinion in the bank tax cases, these two suits were brought. One of these suits is to enjoin the Board of Valuation and Assessment from proceeding to assess the bank for the years 1895 and subsequent; the other to enjoin the city of Louisville from attempting to collect the taxes certified under the assessment for the years 1893 and 1894.

These cases differ from the cases of the Bank of Kentucky in that the Bank of Louisville has had, up to the time it filed these two bills, no litigation in its own name, either with the City or the State, on the subject of its original contract, or its contract under the Hewitt Law.

The Bank of Louisville, however, claims to be privy to the judgment obtained in favor of the Bank of Kentucky in its suit in prohibition against the judge of the city court of Louisville and the city of Louisville, and to have the same benefit of presumption from the thing adjudged as belongs to the Bank of Kentucky.

The Circuit Court held that it was so entitled, and granted an injunction in each of the cases.

The opinion in the record in the case of Samuel H. Stone v. The Bank of Commerce, No. 362, is applicable to the cases now under discussion.

Stipulation in Reference to Litigation Between the City of Louisville and the Banks.

The Bank of Louisville is a member of the Clearing House Association of that city.

At a meeting of this Association, held October 30, 1893, the following resolution was adopted:

> "*Resolved:* That it is the sense of this association that in any and all legal contests that may be instituted or arise, concerning taxation, whether it be to sustain the charter rights of the old banks, the contract under the Hewitt Law, or on any other lines, the members of this association will act jointly, and bear their proportion of the fees and costs incurred, to be calculated and fixed by uniform assessment on their respective capital, surplus, and deposits.
>
> "*Resolved:* That Messrs. James P. Helm and Alex. P. Humphrey be employed to represent the interests of this association in such legal proceedings."

Among the other banks voting in favor of this resolution was the Bank of Louisville (No. 362, R. 86).

In December, 1893, the City of Louisville passed an ordinance, requiring all the banks in the city to pay, in lieu of an *ad valorem* tax, 4 per cent upon their gross receipts.

Henry S. Barker, now one of the judges of the Jefferson Circuit Court, was at that time the City Attorney of the City of Louisville, and also the attorney of the Sinking Fund Commission of the City of Louisville.

In his deposition (No. 362, R. 43) he says:

> "The matter in controversy between the banks and the city came to a head about November, 1893. About that time, in conference with the attorneys for the banks and trust companies, Messrs. Helm & Bruce and Humphrey & Davie, the litigation being in the immediate charge of Mr. Helm and Judge Humphrey, of these two firms. I knew, as I said before, that they were contending and had contended all the time that they had an inviolable contract under the Hewitt bill with the State of Kentucky exempting them from all local taxation. The city authorities having come to the conclusion that they had the right to tax the banks and other financial institutions of the city, chose to tax them by means of a license tax upon their gross receipts. On the banks and trust companies the amount fixed was four per cent of their gross earnings. As soon as this ordinance became a law, under my direction the various license inspectors of the Sinking Fund notified each bank and trust company in his district that it would be required to pay the license at once or the ordinary proceedings would be taken against them to force them. This was what is called an ordinance warrant, by which the party is summoned before the police court of the City of Louisville, and if found delinquent on his license a fine is imposed, which is repeated as long as the delinquency continues."

At a meeting of the Clearing House Association, held on the 2d of February, 1894 (No. 362, R. 87), the following resolution was adopted:

> "*Resolved:* That the committee heretofore appointed at the meeting of October 30th, 1893, be, and are hereby, authorized to determine the matter of resisting the city ordinance providing license taxes, and to determine whether

each bank shall resist or test cases be made by banks selected by the committee, and also to determine whether any portion of said license tax be paid, or, if any portion, what shall be, and how it shall be paid, and by what banks. In the event the committee make test cases, it is understood that any expense or penalties suffered by any bank making such test cases shall be borne by the clearing house in the proportion of capital, surplus, and deposits."

At a meeting of the Louisville Clearing House Association, held on February 12, 1894, the committee on taxation made a report.

We make the following extract (No. 362, R. 88):

"We have had several conferences with Messrs. Humphrey & Davie and Helm & Bruce with reference to the probable expense of the banks in the matter of the tax litigation. . . . The services so rendered by the attorneys will include all the legal attention that is required, of whatsoever kind, growing out of this tax question, for every bank in the city of Louisville, with preparation and argument of the cases before the Court of Appeals and the Supreme Court of the United States, if necessary; and for such services the fees to be charged shall in no event exceed the amount named as the maximum, and with the further understanding that the fees charged shall be based upon the reasonable value of services rendered.

"Your committee are further advised to say that if this litigation is placed in its hands it proposes to have regard to that which will be of permanent benefit to the banks, rather than any effort to gain mere temporary success. It may well be that the present system of taxation proposed by the State and city can be entirely avoided temporarily, but if such a defect were pointed out and urged as a defense, the result might well be that the State would by legislation cure this defect, and be led to adopt a system of taxation which is much more onerous than the present one. Your committee will expect, in conducting this litigation upon the part of the banks, to have regard to sound policy and commercial reasons and prospects to a greater extent than to mere questions of law. In other words, it will be the purpose of the committee to secure to the banks what are their rights, but to endeavor, in making the effort to secure them, not to involve the banks in such questions as will lead to

their being much more heavily taxed than is at present proposed if the litigation should be unsuccessful.

"It will be the purpose of the committee to maintain as friendly and pleasant relations with the taxing power as are possible, and to do nothing to stir up any public sentiment against the banks, and to do nothing that will give any one occasion to say that the banks are making mere technical objections in order to escape their fair proportion of public burdens.

"In reposing the power in the committee to conduct this litigation a very large discretion must necessarily be given. The committee will endeavor to use it wisely and to the best interests of all concerned."

This report was adopted, the Bank of Louisville, among others, voting for it.

Under the ordinance of the City of Louisville, the license tax of four per cent on gross receipts was payable to the commissioners of the sinking fund.

On February 13, 1894, the following proceedings were had by the commissioners of the sinking fund of the City of Louisville, and the same spread at large upon their minutes (No. 362, R. 64):

"A committee, consisting of Messrs. Thomas L. Barret, John H. Leathers, and George W. Swearingen, appeared before the board on behalf of the banks who are members of the Louisville clearing house and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 20, 1894, on the ground that said banks were not legally liable to pay the same; but, in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them and lend the sinking fund the balance thereof, to be repaid, with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

"After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust

and title companies, who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

"First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the 'Hewitt bill.' This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner or to any extent prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

"Second. In addition to making the above payments the said banks and companies, save those selected to test the question involved, shall each lend the sinking fund a sum which, added to said payment, will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same, with interest at four per centum per annum, when and if it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid; but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee, and the obligation to repay the same shall be void.

"Third. The banks or companies selected to test the question involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and will receive therefor the obligations of the sinking fund above described.

"Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license."

Judge Barker, in his deposition, describes this conference as follows (No. 362, R. 44):

"When this conference of February 13, 1894, was held, we were brought face to face with the fact that all the banks

and trust companies claimed immunity; also that they were divisible into three classes. One class was those banks whose charters had been granted them prior to the act of 1856, with which the court is familiar; those State banks whose charters had been granted them subsequent to the act of 1856; and the National banks; and it was supposed by counsel that the trust companies went into the class of State banks whose charters had been granted subsequent to the act of 1856. The attorneys for the banks informed us that they proposed to resist the payment of any tax, license or *ad valorem*, and to stand upon and contend for their rights under the Hewitt bill; and, of course, unless some agreement was made for selecting and making the test cases, this would result in bringing a suit for each one of the corporations involved, there being from twenty-three to twenty-five, if I recollect correctly. It seemed to us that it would be useless to bring so many suits, entailing a very much larger cost upon the losing side, and also entailing a good deal more labor upon the judges who had the matter to decide; and we therefore agreed to select one of each of the natural classes into which these financial institutions divided themselves in regard to their defenses, and allow the final judgment rendered in that case to go as to all of that class."

Judge Barker further states, in the same connection, that he was given to understand that if this arrangement was not entered into, each of the institutions would refuse to pay any thing; and would bring its separate suit; and that, to save all this, the agreement in regard to the classes was made. (No. 362, R. 44.)

At a meeting of the Louisville Clearing House Association, held on the 14th day of February, 1894, the special committee on taxation presented the following report (No. 362, R. 90):

"Your committee on taxation would respectfully report that in pursuance of their authority to arrange in reference to testing all of the legal rights of the banks in regard to taxation, and at the same time to prevent any unnecessary friction with the taxing authorities, your committee, in company with the counsel selected by the clearing house, have had a conference with the Board of Sinking Fund Commissioners of the City of Louisville. This conference

was held upon yesterday afternoon, and we have called this meeting so as to lay before you the result of the joint action of your committee and the Sinking Fund Commissioners. As you are aware, the four per cent tax on gross earnings prescribed by the ordinance is payable to the sinking fund. It so happens that, this year, the maturities of the sinking fund are to a very considerable amount in excess of any probable income. You are further aware that the council, in making its levy of ad valorem taxes, omitted the usual levy that is made for the benefit of the sinking fund; under the idea that the new licenses which, under the charter, the council had the authority to impose, would make up an income to the sinking fund, commensurate with the former ad valorem tax. It would be, therefore, a matter of considerable disappointment to the city, as well as to the Sinking Fund Commissioners, should this substituted income to the Sinking Fund Commissioners not be collected; and as the credit of the city is a subject upon which the community is naturally very sensitive, we believe that it is our duty to do every thing we can to avoid giving any sort of shock to it.

"The proposition that has been formulated by the conference between your committee and the sinking fund, is as follows:

"All of the banks which are not selected to make the test cases shall pay to the sinking fund 32½ cents on each share of capital stock of the bank. This 32½ cents is the difference between the 42½ cents paid to the State on the first of July and the 75 cents which would have been paid under the Hewitt Law. Besides the payment of this 32½ cents to the sinking fund, it is further proposed that each of the banks, not selected to make the test cases, shall lend to the Sinking Fund Commissioners, at four per cent interest, an amount equal to the difference between the 32½ cents on each share of capital stock and the 4 per cent on gross receipts. The sinking fund commissioners are to execute to each of the banks making such loan a non-negotiable security, payable if and when it shall be decided that the city had not the right to exact the 4 per cent on gross receipts from the banks.

"The result of this will be, that if our litigation turns out favorable to the banks these obligations will become due to the banks; if it turns out to be unfavorable, they will be simply used as a payment by the banks of the tax which is exacted by the ordinance.

"It is further proposed that, as to the testing banks, viz., those banks that are selected to make the test cases, they shall lend to the sinking fund, upon a similar obligation and at the same rate of interest, the 4 per cent on their gross receipts, payable in the same way as the other obligations above described.

The reason why the difference is made between the banks that make the test cases and those who do not, is that it is thought desirable by our counsel that those banks that make test cases shall not have paid any thing at all upon the tax. It is, however, thought desirable that they shall lend the money, so as not to disappoint the sinking fund in its present necessities.

"If this plan is followed out, the sinking fund will have all of the money that it expected to get, and will have had it at a low rate of interest, even though it should turn out hereafter that they had no right to collect any of it.

"Your committee, after full conference with their counsel and the sinking fund commissioners, believe that this proposition is a fair one on both sides; that it is as much as the banks can be asked to do, and that the sinking fund has the right, if our litigation is to be a friendly one, to ask that this much be done.

"Your committee in this matter have deemed it of the highest importance that this litigation shall be carried on in a way that will show a friendly spirit on the part of the banks, will show that they are not standing upon their rights in any mere technical spirit, and that what they are doing is not with any motive or purpose to embarrass the city or to escape the payment of what is justly due or to make a litigation which is for the purposes of embarrassment or delay; but that the banks are doing every thing they can to aid the sinking fund upon the one side, and at the same time not sacrifice any of their legal rights upon the other.

"We strongly recommend to every bank in the clearing house that it follow out this arrangement, thus proposed by the joint action of your committee and the Sinking Fund Commissioners, and which is unanimously agreed on both sides."

This report was adopted; the Bank of Louisville being present.

The Bank of Louisville complied with this arrangement, and paid to the sinking fund, on February 20, the sum of $2,036.26 (No. 362, R. 70, 72).

It executed no note; because four per cent upon its gross earnings about equaled the 32½ per cent upon its capital stock. In other words, the scheme was that each bank coming into the arrangement was to pay to the sinking fund, absolutely, 32½ per cent upon the face of its capital stock; being the difference between 42½ per cent, which the State demanded under the Board of Valuation and Assessment law, and the 75 cents which would have been payable upon each share of capital stock under the Hewitt Law; and to lend to the sinking fund the difference between the 32½ per cent and the 4 per cent on the gross earnings; for which latter amount the Sinking Fund Commissioners gave to each of the banks a promissory note, the form of which is at No. 362, R. 69.

An agreement was made between Judge Barker, as city attorney, and the counsel for the banks, with the view of carrying out the arrangement embraced in the resolutions of the commissioners of the sinking fund and the proceedings of the clearing house. This formal stipulation, however, was not at that time reduced to writing (when it was so reduced to writing, and signed, will be considered hereafter); but that the whole matter was thoroughly considered by all persons interested, will appear from the extracts which we have given, and from the deposition of Judge Barker and of Mr. Leathers, a member of the committee. Thus, Mr. Leathers is asked (No. 362, R. 82):

21 *Q.* Do you recollect the three banks that were selected to bring suit?

A. I do.

22 *Q.* What were they?

A. The Bank of Kentucky, the Third National Bank, and the Louisville Banking Company.

23 *Q.* Will you please state what counsel were employed by the committee to conduct this litigation?

A. The firms of Humphrey & Davie and Helm & Bruce.

24 *Q.* Will you please state what authority was given by your committee to these lawyers in regard to the conduct of this litigation?

A. The clearing house authorized the committee to select the attorneys, which they did, and the attorneys selected were afterwards approved by the clearing house, but the committee itself had full power to act.

25 *Q.* I hand you an agreement purporting to be made between the counsel for the banks and trust companies on the one side, and H. S. Barker, City Attorney, on the other side, approved by C. H. Gibson, President of the Sinking Fund Commission of the City of Louisville, being the original contract filed with the deposition of Judge Barker. I will get you to read that contract and state whether the counsel, Messrs. Humphrey & Davie and Helm & Bruce, had authority from your committee to enter into that contract.

(Objected to by counsel for defendant, The City of Louisville, as incompetent and irrelevant.)

A. Yes, sir; the attorneys for the banks and trust companies, Messrs. Humphrey & Davie and Helm & Bruce, had full authority to act for the banks in making this contract with the Sinking Fund, and were instructed by the committee to do so.

26 *Q.* I will get you to state what was the position of the banks making the test cases, and the banks not making the test cases, in regard to the result of the litigation?

(Objected to by counsel for defendant, The City of Louisville, as incompetent and irrelevant.)

A. Well, we were all to share exactly alike. We had to have three banks of certain classes to make the test cases, by instructions of our attorneys; and it was, in reality, no easy thing to get any of the banks to agree to become the ones selected for that purpose; but the Bank of Kentucky and the Third National Bank and the Louisville Banking Company finally agreed that their names should be used in this litigation, as representing all the banks of their respective classes in the clearing house.

Again (No. 362, R. 85):

Q. As to whether or not the members of each of these classes, which you say the suits that were brought that the banks

who brought suit were to represent, were on the same footing, you never undertook to investigate? You left that to the attorneys entirely, as to whether they had the same legal standing in court as the banks that did bring suit?

A. It was not part of our business to look into that; but all the banks shared alike exactly, in the costs of the litigation; and it was clearly understood that they were to share alike in the benefits that were derived from it.

Judge Barker says (No. 362, R. 45, 46):

> "I had many conferences with the mayor and with the finance committee of the general council of the city of Louisville. This was a most important question to the city of Louisville, and it was the subject of many earnest conferences between the mayor of the city of Louisville and myself and various officers of the city of Louisville. We calculated roughly that these corporations would produce annually, in round numbers, one hundred thousand dollars; a sum which cut a very large figure in the financial calculation of the city and its officials; and it was of the utmost importance to have every thing done that would expedite and simplify the contention between these corporations and the city of Louisville; and I want to say just here that, while it does not seem to have been put into any of these agreements, there was a very important understanding between the counsel for the banks and myself, and that was to expedite this litigation as far as it could possibly be done; and which was done and carried out, although it does not seem to have been reduced to writing."

Q. You say you had this conference with the mayor and the finance committee of the general council. Did they concur with you in the propriety of entering into this agreement?

A. Most fully. I want to say here that this was a most important matter, both to the banks and to the city, and we approached the subject with the view of settling the contention in the most expeditious way possible, and at the same time in a manner that would injure the banks the least. The mayor of the City of Louisville and myself both recognized that litigation such as this was calculated to alarm the stockholders of the banks, and might result in a very serious injury, and all of the parties to the litigation—the bankers, through their counsel; the counsel for the city; the mayor and the officers of the city—all approached this subject with a view of doing the greatest good and the least harm possible to the parties concerned in it.

Warrants were taken out in the city court of Louisville, against the Bank of Kentucky, the Louisville Banking Company, and the Third National Bank: the Bank of Kentucky as representing a class of banks whose charters antedated the year 1856, of which there were only two, the Bank of Kentucky and the Bank of Louisville; the Louisville Banking Company as representing the State banks whose charters were granted since 1856, of which there were quite a number, and also the trust companies; the Third National Bank as representing the National banks. But all of each class were assumed to have accepted the Hewitt Law.

Three suits, for prohibition, were brought in the Jefferson Circuit Court by the three banks: the Bank of Kentucky, the Louisville Banking Company, and the Third National Bank.

In each petition the claim was made that the bank could not be taxed in any other method than according to the provisions of the Hewitt law. (See petition of Bank of Kentucky, in No. 356, R. 78; petition of Louisville Banking Company, No. 360, R. 16; petition of Third National Bank, No. 404, R. 17.)

On July 24, 1894, Judge Field, of the Common Pleas Division of the Jefferson Circuit Court, delivered an opinion in all three of these cases, which had been submitted to him on demurrer. (No. 356, R. 85.)

In the case of the Bank of Kentucky, he entered a judgment, which has been copied into the brief filed in behalf of that bank; prohibiting the City of Louisville and R. H. Thompson from proceeding further with the warrant against the Bank of Kentucky.

In the other two cases he sustained the demurrers and dismissed the petitions.

The City of Louisville, and Judge Thompson, as appellants, prosecuted an appeal from the case decided in favor of the Bank of Kentucky. (No. 356, R. 89.)

The Louisville Banking Company and the Third National Bank prosecuted appeals in the cases which had been decided

against them, the appellees being Judge Thompson and the City of Louisville.

The case of the Bank of Kentucky was affirmed; the other two reversed; in accordance with the opinion in the "Bank Tax Cases." (97 Ky. 590.)

It will be observed that the judgment rendered in these cases in the Jefferson Circuit Court was in July of 1894.

The opinion of the Court of Appeals was not rendered until June, 1895.

In the mean time, at a meeting of the Louisville Clearing House Association, held December 17, 1894 (No. 362, R. 92), the following report was made, which was adopted:

> "Captain Leathers, from the committee of taxation, reported as follows: That it was expedient that all the banks, except the Bank of Kentucky, Bank of Louisville, Third National Bank, and the Louisville Banking Co., should surrender the notes given them by the sinking fund in 1894, and that all the banks except the Bank of Kentucky and the Bank of Louisville should, for the year 1895, pay the four per cent license tax without reservation; provided, always, that the general council shall pass a levy ordinance that does not include in its terms tax on capital stock, surplus of banks and trust companies."

Accordingly, in accordance with this resolution, all the banks who had taken notes from the commissioners of the sinking fund, except the Bank of Kentucky, the Louisville Banking Company, and the Third National Bank, surrendered these notes (No. 362, R. 69, 70, 78); and all of the banks, with the exception of those three, paid the license tax for the next year. The sum thus paid into the treasury of the Sinking Fund amounted to about $150,000.

About this time the following stipulation was signed (No. 362, R. 65, 66):

"STIPULATION BETWEEN THE CITY OF LOUISVILLE, THE COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE, AND THE BANKS, TRUST, AND TITLE COMPANIES OF THE CITY OF LOUISVILLE.

"It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meeting of said board, and the mayor of the city of Louisville on the one part, and the various banks, trust, and title companies of the city of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part:

"First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust, and title companies, acting through their committee, to wit, Messrs. Thomas L. Barret, John H. Leathers, and George W. Swearingen, and their counsel, to wit, Messrs. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and trust and title companies to pay municipal taxes, either license or *ad valorem*, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

"Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

"(*a*) Banks whose charters had been granted prior to 1856.

"(*b*) Banks whose charters had been granted subsequent to 1856.

"(*c*) National banks.

"It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, above named.

"Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky, representing class A, the Louisville Banking Company, representing class B, and the Third National Bank, representing class C, and these banks re-

spectively applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

"It was distinctly understood and agreed at that time, and this agreement was made for the best interests of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes; and it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill, that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

"Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the Sinking Fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the Sinking Fund Commissioners of February 13th, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

"HUMPHREY & DAVIE,

"HELM & BRUCE,

"*For the Banks, Trust and Title Companies of the City of Louisville.*

"H. S. BARKER,

"*City Attorney.*

"Approved:

"C. H. GIBSON,

"*President Commissioners Sinking Fund, City of Louisville.*"

As to when this agreement was signed, Judge Barker makes the following statement (No. 362, R. 46):

15 *Q.* The agreement which you have examined and which I now hand you again, signed by the parties, appears not to have been dated. Can you state about when that agreement was reduced to writing and signed?

A. I have no independent recollection of that matter, but an examination of the paper itself convinces me that it was December, 1894.

16 *Q.* Before or after the second payment?

A. After the second payment—immediately after.

17 *Q.* Now, state when the second payment by the banks and trust companies was made.

A. In December, 1894. I know that this original stipulation represents truthfully the facts in every particular, and the recitation of the surrender of the notes and the payments being made absolute, in it, convinces me that it was made after the second payments were made; and I know that it must have been done immediately after, and perhaps was drawn up and agreed to in every detail at the time the payments were made, and delivered afterwards.

18 *Q.* At the time this agreement was reduced to writing had there been any decision rendered either way by any court?

A. Yes; a decision by the lower court had been made and was, except in the cases of the Bank of Kentucky and the Bank of Louisville, adverse to the banks and trust companies.

Also (No. 362, R. 50, 51):

50 *Q.* I will ask you to state, if you can state now positively, if this original agreement, which you did sign, was executed before the decision of the Court of Appeals by Judge Pryor, June 1, 1895.

A. Most assuredly it was; and before Mr. Tyler died. (The Mayor.)

51 *Q.* What enables you to state that?

A. Every fact in it shows it.

52 *Q.* What fact shows it?

A. The fact that the mayor agreed that he would sign it, and I know it to be true, and I would have remembered it distinctly; and in the second place I know the banks would not have agreed to it afterwards, and there would not have been any use in executing it afterwards.

53 *Q.* Point out any thing in the body of that contract that indicates that it was signed before June 1, 1895.

A. I do not need to look at that. I know that it was signed before. I remember that it was signed before, in Mr. Tyler's lifetime. I remember, as I told you, that he could not be present, and asked me to sign it.

54 *Q.* Did he tell you to sign his name or the city of Louisville to it?

A. No; he told me to execute it; and I did execute it as an agreement theretofore made and theretofore in a large part carried out.

Judge Barker is asked further in reference to this agreement (No. 362, R. 49, 50):

A. No; I do not remember who reduced it to writing, but the matter was all fresh in our minds, and it had been carried out to the letter, as we all understood it, and there was no controversy about the details of the agreement.

40 *Q.* Do you know why it was left undated?

A. No; I do not. You can see that it was acted on before it was reduced to writing, and I can only say that that was the result of the absolute confidence that existed between the city attorney at that time, and the counsel for the banks. Whatever they said to me I relied on implicitly, and I know whatever I said to them they relied on with equal certainty.

41 *Q.* Who presented that agreement to you for your signature?

A. I do not remember now but one independent circumstance, Colonel, and that was that Mayor Tyler did not sign it. He, having to go somewhere, told me to sign it; but I presume that they were all present except the mayor.

42 *Q.* That agreement purports to be entered into by the mayor of the city, as I understand it. Did Mayor Tyler or any one as mayor of the city ever sign that agreement?

A. No; as I told you, that was the only independent circumstance that I remember now. Mayor Tyler had to be absent, and I remember distinctly of his so saying, that he could not be present, and told me to sign it.

43 *Q.* I have not asked what he said, but simply the facts.

A. I am giving you the reason the signature does not appear there.

44 *Q.* How long was he absent from the city?

A. I don't know that he was absent from the city at all. He was to be absent at the time that paper was to be signed.

45 *Q.* Was there any reason why he did not sign it subsequently when he had the opportunity?

A. None except the fact that the bankers and their attorneys knew that that paper was signed in absolute good faith and would be carried out in absolute good faith by Mayor Tyler and myself. As I said to you, these gentlemen had had many conferences, both with Mayor Tyler and myself, and they knew what he thought, and knew how he regarded this matter; and all of that was a, b, c, to us.

Again (No. 362, R. 52):

65 *Q.* Can you give any good reason why this agreement was not reduced to writing at the start instead of being put off and left in a verbal and indefinite condition for a year or more?

A. I can give you a reason. I don't know whether it would be a good one. I think I have already given it. The banks relied on me, and I relied on their attorneys. There was no question but what it would be enforced to the letter as between the attorneys and myself; and if we had won, I would have expected every one of those corporations to step up and pay.

Again, he says (No. 362, R. 54):

75 *Q.* In this undated agreement which you signed I see that it refers, in the outset of it, as being executed under the authority of the Board of Sinking Fund Commissioners, given at a regular meeting of said Board; had that reference to the meeting of February 13, 1894?

A. I presume that that is true; that seems to be the sense of it, and, although it is not on the minutes, this paper was signed by the President of the Board of Commissioners of the Sinking Fund, with the full knowledge of the Board.

(Defendant excepts to the answer on the ground that the minutes of the Board show the acts of the Board.)

And again (No. 362, R. 55):

77 *Q.* Why is it that instead of the President of the Sinking Fund Commissioners executing the agreement contemplated by the resolution of February 13, 1894, he simply approved the agreement entered into between you and the attorneys for the banks?

A. I presume that he considered that that was the same thing; that what he did, was the execution of it.

78 *Q.* I will ask you to state if that agreement, which bears no date, signed by you, was ever presented at a regular meeting of the board of sinking fund commissioners and approved or ratified by that board?

A. Yes; and it was signed at a regular meeting, by me.

79 *Q.* Does the journal of the board of sinking fund commissioners show any such state of fact as that?

A. I don't know, but it was lying on the table, and signed by me, right there, in their presence.

80 *Q.* Would not the secretary of the board of sinking fund commissioners know of that fact if it had been there?

A. I don't know that he would have remembered it.

81 *Q.* Will you give the date of any such alleged board meeting when a majority of the commissioners were present and this was presented for ratification or approval?

A. No; I don't remember the date.

Again (No. 362, R. 57):

90. *Q.* It was left, however, to the recollection of yourself or counsel claiming to represent the banks and trust companies as to what banks or trust companies were entitled to claim under this agreement. In other words, there is no record preserved, either in the agreement itself or otherwise, as to what banks and trust companies could claim under it?

A. We had the best record in the world, Colonel; we had their money; every one of them paid, while the agreement was in our mind; and the record shows exactly who was in it; it shows who paid, and who did not, and when they paid; and it shows the amounts they paid.

We have endeavored to make this narrative as consecutive as possible, taken as it is from the depositions of various witnesses and the proceedings of the sinking fund commission and the Louisville Clearing House Association. It will effect our purpose if it will show, what the reading of all of the evidence will demonstrate—that there was the most perfect understanding between the counsel representing the city upon the one side, and the banks and trust companies upon the other; that the banks and trust companies were claiming the benefit of their contracts under the Hewitt law, but desired that the litigation over the matter should be as little troublesome to the city and the sinking fund commission as was possible, consistent with a full and fair determination of the whole matter; and with a view to putting an end to the controversy in every case by the determination of a case which should be typical.

The question then arises, as a matter of law, whether the Bank of Louisville, under these circumstances, is privy to the

Bank of Kentucky in the suit brought by the Bank of Kentucky in the prohibition proceedings.

In the brief filed on behalf of the City of Louisville, this stipulation is called an "undated agreement;" with a reiteration that would seem to imply that this was a vice, for which there could be no apology or palliation.

In the same brief it is stated that the stipulation "bears on its face the earmarks of an agreement whose covenants were framed in the light of a decision of the Court of Appeals of June 1, 1895, and in all probability to form the basis of a plea of *res judicata*, in the event that the decision was subsequently overruled. In other words, it is apparently the result of an *afterthought*."

Again it is said:

> "Is it not probable, therefore, that this retrospective agreement was not reduced to writing and signed until after the decision of the Court of Appeals of June 1, 1895? There is nothing in it to show it was executed at an earlier date. Thus this important stipulation appears to have been carried in the memory of counsel until that decision, and then it was formulated for the first time."

We have only to set over against these remarkable statements, the testimony of Judge Barker. If that was not satisfactory, the present representative of the City of Louisville might easily have called some one or other of the signatories to that paper. It does not mend the matter that the same brief, in speaking of Judge Barker, says:

> "We do not question his motive, or good faith, in entering into this alleged stipulation."

There is, however, another circumstance, a consideration of which the learned counsel, in drawing these extraordinary conclusions, seems to have entirely omitted. We quote again from the deposition of Judge Barker on cross-examination (No. 362, R. 53):

69 *Q.* I will ask you to state whether or not the terms of this agreement have been abided by or violated by any of the banks existing in the city of Louisville when it was entered into; if so, what banks and in what way?

(Objected to.)

A. Well, I don't know any thing on that that the records will not show you fully. Some time after the first decision by the Court of Appeals four banks brought suit against the city of Louisville to recover the money they had paid under the agreement. I want to state that the counsel who represented the banks and who made the agreement with me were not the counsel who brought those suits, but, on the contrary, they refused to bring them, and all of them have assured me that they were ready to give any evidence they could that would enable me to defeat those suits. The banks in question were the German Bank, the Western Bank, the German Security Bank, and the Louisville City National Bank. All of these suits are, of course, public records, and will show for themselves what they claim and by whom they are brought.

These suits were brought in the spring of 1896. The city promptly answered, setting up this stipulation as a bar (No. 362, R. 59–61).

We quote from that answer (No. 362, R. 61):

> "For further answer herein to both paragraphs of the petition, the defendants say that after the passage of the ordinance set out in the petition assessing the banks the plaintiff and all the banks and trust companies of the city of Louisville entered into a combination and jointly employed counsel to test their rights under the contract with the State of Kentucky as contained in the act known as the Hewitt bill; that by agreement with and at the instance of counsel for plaintiff and the other banks and trust companies in the city of Louisville these defendants, in order to make test cases wherein might be decided the respective rights of the city of Louisville to tax the banks and the rights of the banks under the contract set forth in the 'Hewitt bill,' sued out three warrants in the city court of Louisville, one against the Bank of Kentucky, another against the Louisville Banking Company, and another against the Third National bank of the city of Louisville,

> whereupon the said three banks last named, by their said counsel, instituted three separate actions in the Jefferson circuit court against R. H. Thompson, judge of the city court of Louisville, and the city of Louisville, wherein it was claimed that the ordinance in question was void, and praying that the said city of Louisville and the said R. H. Thompson, judge of the city court of Louisville, be prohibited from prosecuting said actions against said banks. It was then and there agreed that the judgment of the court in these three actions should be the judgment as to the rights of all the banks and trust companies in the city of Louisville."

We are far from denying that the purpose of the stipulation was to form the basis of a plea of *res adjudicata*. But this purpose was one which the city had as well as the banks. And the first use made of the stipulation in court was by the city.

The question that this court will have to determine, in the first instance, is the question of fact.

Did the counsel for the banks, upon the one side, and the counsel for the city of Louisville, upon the other side, enter into an agreement by which there were to be three test cases, which were to decide finally, for the city and for the other banks and trust companies, the matters involved?

Was there an agreement by which the judgment which should be entered in these test cases was to bind both parties, not only in the particular litigation, but in respect to each of the institutions falling within the same category?

It seems to us there can be no doubt of the answer to this question upon the evidence presented, and the learned Circuit Court had no difficulty whatever with it.

The effect of such an agreement is the next question to be determined.

As we understand, it is admitted by the counsel for the city that if warrants had been taken out against all of the banks, and suits in prohibition brought by all of the banks, it would have been entirely competent for the city attorney to agree to try one

or more of the cases, and to have the same judgment entered in all of them; that this was within the scope of his authority as the legal representative of the city of Louisville. Nor do we understand it to be denied that if this agreement was within the scope of the authority of the city attorney, the banks, in each of the classes designated, became thereby privy to their representative institution, and would be entitled to plead the judgment upon the one hand, or would be bound by it on the other, whatever that judgment might be; just as if such bank had been the party upon the record.

These two positions seem to be conceded; and, indeed, the authorities given in the opinion of the learned Circuit Court conclusively establish them.

There is no question here as to the right of the city attorney or the mayor of the city of Louisville, or the commissioners of the sinking fund or common council of the city of Louisville, to make an agreement by which any property holder shall be exempt from taxation for any length of time. There is here no question relating to the power of any city official to commute the taxes of any citizen.

The provisions of the Constitution of the State of Kentucky upon this subject are quite beside the mark.

The question to be determined is:

Was this agreement such an one as was embraced within the power of the city officials who entered into it and authorized it, as a step in the orderly ascertainment of the right of the city, upon the one side, and of the banks upon the other?

Undoubtedly we have shown that the counsel for the banks had the right to make this stipulation on behalf of their clients.

There is no doubt that if the cases had been decided in the Court of Appeals in 1895 as similar cases were decided in the Court of Appeals in 1897, all of the banks and trust companies in and embraced by this agreement, would have been bound by such judgments; even though, in other cases, a contrary decision had subsequently been arrived at.

In other words, let us suppose that a majority of the Court of Appeals, in 1895, had held that the Hewitt Law was repealable; manifestly, all of the banks who entered into this arrangement with the city of Louisville would have become taxable under the Board of Valuation and Assessment law; and this result would not have been in the least affected, if, in 1897, the Court of Appeals had, in another case or cases, decided that the Hewitt law was irrepealable.

We simply mention this to show that the authority of the city attorney can not be measured by the result of the exercise of that authority. Indeed, at the time when, according to the evidence in this case, this agreement was actually reduced to writing, it condemned all of the banks and trust companies in the City of Louisville, with the exception of the Bank of Kentucky and the Bank of Louisville, to the payment of taxes under the Board of Valuation and Assessment law; because, at that time, viz., in December, 1894, the judgment of the Jefferson Circuit Court, unreversed, was in favor of the Bank of Kentucky and the Bank of Louisville, but against all of the other institutions.

If the Court of Appeals in 1895 had been composed of the same judges as composed it in 1897, we would have heard of no challenge of this agreement on the part of the City of Louisville.

For convenience we now quote substantially in full the opinion of Judge Taft on this question:

> "We are of the opinion that the City Attorney was vested with ample authority to bind the City of Louisville to the contract mentioned in so far as it affected the complainant herein. By Section 2909 of the Revised Statutes of Kentucky it is provided that:
>
> "'There shall be elected by the General Council, immediately upon the assembling of the new board, a city attorney, whose duty it shall be to give legal advice to the Mayor and members of the General Council, and all other officers and boards of the city in discharge of their official duties. If requested, he shall give his opinions in writing,

and they shall be preserved for reference. It shall also be his duty to prosecute and defend all suits for and against the city, and to attend to such other legal business as may be prescribed by the General Council.'

"The foregoing section makes this officer the retained attorney of the city in every suit brought by it or against it. The question at issue between the banks and the City of Louisville was whether the city could collect license taxes under one of its ordinances. The banks notified the City Attorney and the commissioners of the sinking fund, whose duty it was to receive the money for the benefit of the city, that they intended to resist the collection of the tax by litigation. It was the duty of the City Attorney, under the statute above set forth, to take charge of the litigation thus about to be brought. It was his duty, as the attorney of the city, to save, so far as he could without prejudice to the city's interests, costs which might be accumulated should suits to the number of 20 be brought and won by the banks against the city. It seems plain to us that it was within his general authority as attorney to make an arrangement with the intended litigants, by which the litigation to be brought should be reduced in volume to as few cases as possible by means of stipulation that all the suits involving the same questions should abide the result in one suit to be brought. We think that such a stipulation was a mere step in the management of the litigation, and was entirely under the control of the attorney retained for the suits. It did not work to the prejudice of the city in the slightest. Had the suits actually been brought, a stipulation between the City Attorney and the attorneys for the banks of this character would have been as clearly a part of the ordinary management of the suits as any other arrangement for expediting their trial. No material distinction can be suggested between the power of the City Attorney to make an agreement of this character with respect to intended suits and suits actually filed. The control that an attorney has by virtue of his office over the suit in which he is employed is very wide in respect to those matters that relate to the progress of the suit and the mode of reaching a conclusion, and which do not deprive the client of a full opportunity to be heard by his attorney on the issues raised in the case. Such authority inheres in the relation between an attorney and client in respect to litigation, and the authorities fully sustain this conclusion.

"In Railroad Co. v. Stephens, 36 Mo. 150, the plaintiff railroad company brought several suits against different stockholders in which the questions were precisely the same. The attorneys for the respective parties entered into a written agreement stating that, as the same facts arose in all the cases, they would abide by the judgment that should be rendered in one of them, and that a like judgment should be rendered in each of the several cases. It was contended in that case that the attorneys who made the agreement had no authority to make the agreement, and that it was void. The court sustained the agreement as within the authority of the attorney. It said:

"'The arrangement in this case is not a "compromise" according to the usual acceptation of that term, for that generally applies to releasing a part of the debt, taking land instead of money, or changing the nature and character of the thing to be recovered. It comes nearer within the general management of the case.'

"In Ohlquest v. Farwell, 71 Iowa, 231, 32 N. W. 277, a client was a party to two suits involving substantially the same question. It was held competent for his attorney to bind him by an agreement that only one of the cases should be tried, and that the judgment resulting from such trial should determine the kind of judgment to be entered in the other case. In delivering the opinion of the court, Judge Beck said:

"'It is undoubtedly true that an attorney can not consent to a judgment against his client, or waive any cause of action or defense in the case; neither can he settle or compromise it without special authority. But he is, by his general employment, authorized to do all acts necessary or incidental to the prosecution or defense which pertain to the remedy pursued. The choice of proceedings, the manner of trial, and the like, are all within the sphere of his general authority, and, as to these matters, his client is bound by his action. These rules are conceded by counsel in this case. It can not be doubted that, under them, counsel for parties in several suits, involving the same issues, may, in the exercise of their general authority, consent to the consolidation of all for trial, or stipulate that the trial of one shall determine the others. This pertains to the remedy pursued—to the manner of trial—and is not an agreement for judgment or a compromise. The parties are not deprived of a

trial, nor is judgment rendered by consent. The counsel simply assent to a trial in a particular manner; that one trial shall settle the same issues in several cases. This is just what was done by the counsel for Becker in this case. The form of agreement is that judgment in his case should follow a trial in another action. This is not an agreement for a judgment, but in effect an agreement for a manner of trial.'

"See also Eidam v. Finnegan, 48 Minn. 53, 50 N. W. 933; Gilmore v. Insurance Co., 67 Cal. 366, 7 Pac. 787.

"In Thompson on Trials (Volume 1, S. 195) the author says:

"'Where several cases are pending in court, depending upon the same facts or questions of law, it is competent for the attorneys, in virtue of their general retainers, to stipulate that only one shall be tried, and that the others shall abide the result of that one.'

"We think, therefore, that, in so far as the issues arising between the banks not actually engaged in the litigation and the city of Louisville were the same as in the three suits which were brought as test cases, the contract made by the city attorney was binding upon the city.

"The next question is whether the contract made enables the complainant bank to claim the benefit of the estoppel of the judgments thereafter rendered. We think it does. In Patton v. Caldwell, reported in 1 Dall. 419, the action was on a policy of insurance. Counsel for plaintiff offered to read in evidence a special verdict that had been given in another action against a different underwriter. This was objected to on the ground that the verdict was given between other parties, and therefore not admissible, upon which an agreement of all the underwriters to be bound by one verdict was proven. McKean, C. J., said:

"'The defendant had no opportunity of cross-examining upon the former trial; and the answer is that he, with the rest of the underwriters, had agreed to be bound by one verdict, which is certainly the only ground for offering the evidence proposed by the plaintiff's counsel. Whether this agreement was made in person or by a broker mutually employed, it is equally binding on the parties; and, under the agreement, all the underwriters were fully entitled to interfere upon the former trial, and to cross-examine the wit-

nesses then produced. Although, therefore, we should not have allowed the special verdict to be read, without full proof of the agreement, yet, on receiving that satisfaction, we think it would be unfair to suppress it; and for the future, we desire that all such agreements may be entered on the records of the court.'

"The Court then held that the verdict thus offered was not conclusive. As the latter proposition, however, is in conflict with the rule laid down by the Supreme Court of the United States in a recent case of Southern Pac. R. Co. v. U. S. 1, 18 Sup. Ct. 18, that part of the decision can not be regarded as authority here.

"In Brown v. Sprague, 5 Denio, 545, several ejectments were pending between one claiming title and persons having only the naked possession of the lands. An agreement was made between all the parties that the suits should be stayed and await the event of a suit between other parties in which the same questions arose. It was held that a judgment in that suit would operate as an estoppel between the parties to the agreement.

"Mr. Freeman, in his work on Judgments, says (Section 174):

"'Neither the benefit of judgments, on the one side, nor the obligations, on the other, are limited exclusively to parties and their privies. Or, in other words, there is a numerous and important class of persons, who, being neither parties, upon the record, nor acquirers of interests from those parties after the commencement of the suit, are, nevertheless, bound by the judgment. Prominent among these are persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person. . . . The fact that an action is prosecuted in the names of nominal parties can not divest the case of its real character, but the issues made by the real parties, and the actual interests involved, must determine what persons are precluded from again agitating the question, and who are estopped by the previous decision. Whenever one has an interest in the prosecution or defense of an action, and he, in the advancement or protection of such interest, openly takes substantial control of such prosecution or defense, the judgment, when recovered therein, is conclusive for and against him to the same extent as if he were the nominal as well as the real party to the action. . . . Where one

seeks the benefit of an estoppel by judgment on the ground that he was the real party in interest in an action, he must show that he conducted the action or defense openly, to the knowledge of the adverse party, and for the protection of his own interests.'

"These principles are sustained by the cases cited by the learned author. See Cole v. Favorite, 69 Ill. 457; Wood v. Ensel, 63 Mo. 193; Tate's Ex'rs v. Hunter, 3 Strob. Eq. 136–140; Palmer v. Hayes, 112 Ind. 289, 13 N. E. 882; Gill v. U. S., 7 Ct. Cl. 522, 526. See also, Herm. Estop. S. 139.

"In 1 Greenl. Ev. S. 523, the principle is stated as follows:

"' But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them or in privity with them, are equally concluded by the same proceedings. We have already seen that the term 'privity' denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party, is that they are identified with them in interest; and, wherever his identity is found to exist, all are alike concluded. Hence all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon them with whom they are in privity. And if one covenants for the results or consequences of a suit between others, as if he covenants that a certain mortgage assigned by him shall produce a specified sum, he thereby connects himself in privity with the proceedings, and the record of the judgment in that suit will be conclusive evidence against him.'

"In the case of Rapelje v. Prince, 4 Hill, 119, Mr. Justice Bronson, speaking for the Supreme Court of New York, said:

"' When one covenants for the results or consequences of a suit between other parties, the decree or judgment in such suit is evidence against him, although he was not a party.'

"In the present case there can be no doubt from an examination of the contract and the averments of the bill that the three suits which were conducted were openly con-

ducted in the interest of all the parties to the agreement with the knowledge and by the consent of the City of Louisville, and that the counsel who appeared for the parties to the records were at the same time discharging their duties as counsel for the other banks who had made the agreement. If any one can be bound by a judgment to which he is not a party, it would seem that the banks here must have been so bound. Had the result gone the other way, and a judgment been rendered in favor of the city of Louisville in the cases referred to, it can not admit of doubt that all the banks would have been bound by the decision. As part of the consideration for the settlement of the litigation in the manner fixed by the agreement, the banks paid to the Sinking Fund Commissioners of the city of Louisville the substantial sum of $150,000. Had the agreement not been entered into, it is certain that the complainant would have obtained formal judgment in a prohibition suit, and would now have been in the same position as the Louisville Banking Company. Relying on the binding character of the agreement, however, judgment was not taken in the name of the complainant. Equity and justice require that effect should be given to an agreement upon the faith of which $150,000 was immediately paid to the city, and a formal judgment was not taken. It is just that, inasmuch as the banks would have been bound by a diverse judgment, they shall have the benefit of a judgment which was rendered in favor of their colleagues selected to represent them in the suit."

It is argued, however, that the city attorney did not have power to make this stipulation; because, it is said, among other things, that an attorney can not accept service for his client of an original process by which action is begun, and therefore, can not make any stipulation, except in reference to a suit actually in court.

The reason why an attorney can not enter his client's appearance is stated in Starr v. Hall, 87 N. C. 381, thus:

"The principle upon which these authorities rest is that it is no part of the duty of an attorney, nor within the scope of his authority, to admit of service for his client of the original process by which the jurisdiction of the court

> over the person of the client is forcibly established, for, until that be done, the relation of client and attorney can not begin, nor can it be created by the act of the attorney alone."

This reasoning can have no application to the case at bar, because the relation of client and attorney always exists between the City of Louisville and the city attorney; by virtue of the statute defining the authority of the city attorney.

Nor is there any reason why an attorney can not enter into a stipulation before a suit is brought, as well as after the suit is brought.

In Hefferman v. Burt, 7 Ia. 320 (s. c., 71 American Decisions, 445), an attorney, prior to the filing of a suit, agreed that it might be filed at any time within the coming term of the court, and have the same force as if filed ten days before the term.

The court said:

> "If Goodrich, the lawyer, was in fact the attorney of defendant, and had been employed by him in relation to this particular case, he could make the agreement. An attorney may be employed in contemplation of a suit to be brought, and when thus employed, his client would be bound by his stipulation, in relation to the same, to the same extent as if he had stipulated after the suit was brought."

Now, what is the difference in principle between the authority of a retained attorney, authorized to appear in ten cases, if he stipulates that only one need be brought, and that the others shall be concluded by the judgment, and a stipulation, after all ten are brought, that only one need be tried, and the same judgment entered in all?

The one is as large a power as the other. The difference, if there be any, is only that, in the one case, it is easier to prove the authority of the attorney than in the other.

But, in the case at bar, the attorney had a full warrant to appear in all cases; the statute being his warrant; and who can

doubt that the city attorney of the City of Louisville has the right to enter the appearance of the City to any action that may be brought against it?

We have shown above how promptly the City of Louisville took refuge under this stipulation when sued by the recalcitrant banks. When, therefore, learned counsel says in his brief, that the Banks can sue for the money paid by them under the agreement, we respond that four banks did do this, and the City promptly pleaded the stipulation as a complete answer to the demand.

The order in time, of events, is frequently an argument of great weight. In December, 1894, when the suit that bound the city to respect the Hewitt contract as to two banks had been thus decided, and the other suits that cancelled the Hewitt contracts as to all other institutions had been so decided, this stipulation, theretofore verbally agreed and acted on, was committed to writing. In June, 1895, the Court of Appeals decided all the cases against the city. In 1896, four of the banks, disregarding their agreement, sued to recover the money paid under it as without consideration. The city insisted on the agreement as a bar. In 1897, the Court of Appeals reversed its ruling. The institutions which had stood loyally by the agreement now find that the city claims it was never binding at all and affords them no protection.

The learned counsel for the City of Louisville substantially admits that this plea is entirely technical, and that the arrangement could have been made, if we had only insisted upon twenty-five warrants being sworn out, and twenty-five suits in prohibition filed.

But, as this was not done, the banks must bear with complacency the consequences of any mistakes made by their chosen counsel.

We respectfully submit that there is no merit in this contention; that considering what was the authority of the city attorney of Louisville, under the statute, he had full right to enter

into this stipulation, and that, before doing so, he was careful to obtain the assent of the chief executive officer of the City, of the Sinking Fund Commission, and of the other officials, whose duty it was to consider and determine the fiscal condition of the municipality.

In view of what this record shows, it is entirely idle to speak of this agreement having been the result of an afterthought.

So far from its being anticipated that the Court of Appeals might change its ruling, as we have shown above, certain of the banks, disregarding the agreement which had been made on their behalf by counsel having full authority so to do, attempted to recover back money paid under this agreement, as paid under mistake of law, and the city, through its legal representative, defended these suits upon the ground that the agreement was a valid and binding one on both sides.

It seems to us that it would be difficult to imagine a more complete ratification of the agreement than this was. And it would be indeed singular if this ratification should extend to the banks who brought suits to recover the money, and should not extend to the banks who stood by the payments which they had made, in good faith.

Counsel for the city seeks to avoid the plea of *res adjudicata* by attempting to show, among other things, that there is not identity of person, and he seeks to maintain that proposition upon two theories: First, that the suit is only between the banks and R. H. Thompson, Judge of the City Court, and second, that at the most it is a suit between the banks and the Sinking Fund Commissioners of the City of Louisville. We have very little to say upon either of these propositions. It is perfectly evident that Thompson is not sued individually, but only in his representative capacity, and that the real party in interest behind him is the City of Louisville.

Learned counsel, however, insists that the City of Louisville is not the real party in interest whom Judge Thompson represents, but that it is the Sinking Fund Commissioners of the City of Louisville, which he says is a separate corporation.

In response to this we suggest that while the Sinking Fund Commissioners is a separate corporation for the purposes of making contracts and suing and being sued, it is a mere department of the City Government, and has been so distinctly recognized by our Court of Appeals in construing the various acts touching the City and the sinking fund commissioners. Thus it will be found in the case of Clark, Sheriff, v. Water Company, 90 Ky. 522, the Court, in speaking of the Sinking Fund, used this language:

> "While the Sinking Fund of the city of Louisville is a distinct corporation, yet it is owned by the City and merely controls its funds. It discharges no governmental duties, and was created merely to make money for the City."

In that case it was held that money paid by the Sinking Fund into the City was simply the money transferred from one pocket of the city to the other, and was not a real payment.

Again, we have already shown in this brief that the city of Louisville was the first to rely upon this stipulation between the banks and trust companies upon the one side and the city upon the other as a complete estoppel against the action by the four banks which brought suit to recover the money paid under the agreement. We now call attention again to that answer only for the purpose of showing that the city of Louisville in that answer put its own interpretation upon the test suits brought by the three banks for the purpose of determining the alleged contract rights of the bank. In its answer to one of these petitions, this language is used:

> "Whereupon the said three banks last named by their said counsel instituted three separate actions in the Jefferson Circuit Court against R. H. Thompson, Judge of the City Court of Louisville, *and the City of Louisville*, wherein it was claimed that the ordinance in question was void, and praying that said *City of Louisville* and the said R. H. Thompson, Judge of the City Court of Louisville, be prohibited from prosecuting said actions against said banks." (No. 362, R. 61.)

Here the City of Louisville, by its own answer, not only first relied upon the stipulation as a bar to those suits, but did not hesitate to admit at that time that it was the real party in interest, and that a suit against R. H. Thompson, Judge of the Police Court, was in fact and indeed a suit against the city, Thompson being the mere nominal party, while the City of Louisville was the real party.

In this connection, Judge Barker says (No. 362, R. 47):

23. *Q.* Mr. Barker, did you represent Judge Thompson in that litigation?

A. Yes, sir; I represented all that side.

24. *Q.* How did you happen to represent Thompson?

A. Well, that was the way to represent the city, and I got Judge Thompson's permission to do so.

25. *Q.* In order to protect the interests of the city?

A. In order to protect the interests of the city. The writ of prohibition against Judge Thompson was only taken out to test this case and carry out this agreement, and I made known the fact to Judge Thompson, and he, of course, turning the matter over to me, I had absolute charge of that whole side.

Under these circumstances we submit that the city of Louisville can not at this time repudiate that contract and deny that it was the real party in interest.

In conclusion, we respectfully submit, that the agreement was one entirely within the power of the city attorney of the city of Louisville, beneficial to the city, concerning the orderly progress of litigation, and binding, by its effect, the city to all of these banks as privy to the judgments obtained in the three cases of the representative institutions.

And as to the bank whose case is now being considered, the Bank of Louisville, we submit that it was a privy to the suit brought by the Bank of Kentucky, and as fully protected as that bank by the determination of the question.

Respectfully submitted,

ALEXANDER POPE HUMPHREY,
GEORGE M. DAVIE,
Counsel for Appellee.